No. 88-1503

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,

Petitioners,

v.

ROBERT HARMON, Director of the Missouri Department of Health, and DONALD LAMKINS, Administrator of the Missouri Rehabilitation Center at Mount Vernon,

Respondents.

v.

THAD C. McCANSE,
Guardian Ad Litem,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Supreme Court

BRIEF OF AMICUS CURIAE MISSOURI BAPTIST MEDICAL CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Missouri Baptist Medical Center is a non-profit corporation whose health care activities include the operation of a 492-bed hospital located in St. Louis County, Missouri. In the course of providing medical services, the staff of Missouri Baptist Medical Center routinely consult with patients, family, friends, and guardians regarding appropriate medical treatment for patients suffering from serious and catastrophic injury and illness. The Medical Center is also involved in the diagnosis, care and treatment for individuals in a persistent vegetative state.[1]

The decision of the Missouri Supreme Court in *Cruzan v. Harman*, 760 S.W.2d 408 (Mo. banc 1988) directly affects important legal, medical and ethical interests of Missouri Baptist Medical Center and other health care providers. For the past six years, Nancy Cruzan has been kept alive by artificially supplied nutrition and hydration provided by a surgically implanted gastrostomy tube. She has a life expectancy of thirty more years in her current vegetative condition. Confronted by this persistent vegetative patient and a diagnosis that further treatment will not restore cognitive functions, the Missouri Supreme Court held that Nancy Cruzan must continue to receive nutrition and hydration regardless of the fact that her family, guardian ad litem and physicians may believe that such treatment is medically and ethically inappropriate.

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[1] All parties to the case below have consented to the filing of this amicus curiae brief. Letters from all parties providing consent have been filed with the Clerk of the Court.

The Missouri Supreme Court's decision and reasoning creates substantial uncertainty in the medical community regarding what additional life-prolonging treatment must be given to patients in a persistent vegetative state. By mandating that artificial hydration and nutrition must be continued, the Court's decision may also deter patients and families from attempting certain types of care for fear that the patient may subsequently have to be kept living in a vegetative state for years. Finally, the decision contravenes well established principles of medical ethics regarding a patient's right of self determination and the physician's duty to maintain the dignity of the patient.

For the foregoing reasons, Missouri Baptist Medical Center urges this Court to review the decision below to provide guidance to the medical community, patients and their families regarding issues of national importance.

ARGUMENT

In compiling a list of decisions from sixteen other states, the Missouri Supreme Court acknowledged that the courts were nearly unanimous in allowing "persons wishing to die, or those who seek the death of a ward, to meet the end sought." *Cruzan*, 760 S.W.2d at 413. Many of these decisions recognized a federal constitutional right to refuse life sustaining medical treatment and that this right may be exercised by others on behalf of those persons in a persistent vegetative state. *Cruzan's* prohibition against termination of fluids and nutrition delivered

through a gastrostomy tube conflicts with earlier decisions by the supreme courts of Arizona and Massachusetts. *Rasmussen v. Fleming*, 741 P.2d 674 (Ariz. banc 1987); *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626 (Mass. 1986).

Respondents Harmon and Lamkins argue that the Court should not issue its writ of certiorari because any conflict among state supreme courts is limited to an "extremely narrow point" relating to the withdrawal or withholding of nutrition and hydration from a patient in a persistent vegetative state. Respondents' Brief in Opposition, pp. 15-16. While this issue may appear narrow to Respondents, it is vitally important to health care providers and to the families and loved ones of those individuals in a persistent vegetative state.

The Missouri Supreme Court applied a balancing test between an individual's right to refuse treatment (whether that right arises from a federal constitutional right or the common law) and the state's interest in the preservation of life. Rather than addressing whether artificially supplied nutrition and hydration is medical treatment,[2] the court stated that the critical test is whether continued feeding and hydration through a gastrostomy tube is oppressively burdensome to Nancy Cruzan.

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[2] American Medical Association guidelines permit the withdrawal of life-prolonging medical treatment to those patients in an irreversible coma. Life-prolonging medical treatment is defined to include artificially or technologically supplied respiration, nutrition or hydration. Opinion 2.18, Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association (1986).

> Nancy's care requirements, while total, are not burdensome to Nancy. The evidence at trial showed that the care provided did not cause Nancy pain. Nor is that care particularly burdensome for her, given that she does not respond to it. *Cruzan*, 760 S.W.2d at 424.

The application of this so-called balancing test to patients in Nancy Cruzan's condition raises serious issues regarding medical treatment since, by definition, the patient in a persistent vegetative state lacks the capacity to experience pain. All such patients in Missouri must now continue to receive artificially supplied nutrition and hydration for years and perhaps decades. Indeed, under the Missouri Supreme Court's reasoning, virtually all forms of existing artificial life support may have to be continued indefinitely.

The physician's ethical duty is to use aggressive means if there is a hope to cure or improve a patient's condition. Generally, a diagnosis of a persistent vegetative state cannot be made immediately. In the interim, the physician may seek the informed consent of family members to pursue life-prolonging treatment in the hopes of attaining successful medical treatment or other improvement. However, the willingness to pursue such treatment may be chilled by the fear that such efforts, if unsuccessful, will condemn the patient to years in the persistent vegetative state. See *Matter of Conroy*, 486 A.2d 1209, 1234 (N.J. 1985) (Recognizing that such an irrevocable rule "could discourage families and even doctors from even attempting certain types of care and could thereby force them into hasty and premature decisions to allow a patient to die.").

The Missouri Supreme Court also ruled that any federal constitutional or common law right to refuse medical treatment cannot be exercised by family members or other third parties in the absence of the formalities prescribed in Missouri's Living Will statutes, sections 459.010 et seq. R.S. Mo. 1986, or unless there is clear, convincing and inherently reliable evidence of the patient's intent regarding life-prolonging treatment. It is very unlikely that many patients in a persistent vegetative state will have previously satisfied the Missouri Supreme Court's evidentiary standard. This is particularly true for young people and accident victims who may never have expressed their personal views on life-prolonging care. Indeed, many such patients may never even have been able to communicate their wishes, e.g. infants, young children and those born mentally incompetent who for any number of reasons lapse into a persistent vegetative state.

Under *Cruzan*, the State can insist that these patients continue to receive artificial life-prolonging treatment which, in any meaningful sense, provides no benefit. This decision is to be made by the State, regardless of the wishes of the family, medical practitioners or what the patient likely would have chosen. Any right to refuse medical treatment is lost by reason of the patient's incompetency. Judge Blackmar in dissent recognized that there is nothing new in substituted decision-making and rejected the majority opinion's assumption that technological advances mandate that the State become involved in decisions about using life-prolonging treatment.

This Court has never directly ruled on the ability of third persons to invoke federal constitutional rights on

behalf of incompetent persons. Other Courts have recognized that the right to refuse medical treatment must be extended to appropriate third parties on behalf of the permanently comatose, otherwise that individual's right is denied. *Gray v. Romeo*, 697 F. Supp. 580, 587 (D.R.I. 1988); *Brophy v. New England Sinai Hospital, Inc., supra*, 497 N.E.2d at 634. Medical authorities and other courts have recognized that in most cases the patient's family, in consultation with physicians, should be permitted to make these medical treatment decisions. *See Matter of Jobes*, 529 A.2d 434, 444-47 (N.J. 1987).

The doctrines of informed consent and the right to refuse medical treatment are rooted in the right of self determination and personal autonomy. Admittedly, it is a form of legal fiction to permit a third party to exercise the right to choose on behalf of one who is incapable of conscious choice. The alternative, however, is presented in *Cruzan* where the State alone dictates that Nancy Cruzan and her family must endure the prolongation of her persistent vegetative state, perhaps for many more years.

In adopting its unqualified interest in the preservation of life, the Missouri Supreme Court failed to give any significance to maintaining the human dignity of patients in a persistent vegetative state. "The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity." *Brophy, supra*, 497 N.E.2d at 635. This principle was aptly stated by a California appellate court in allowing a conservator to exercise the right to remove a nasogastric feeding tube on behalf of William

Drabick, who had been in a persistent vegetative state for several years:

> We are convinced that we deprive William of a fundamental right if we uphold the superior court's decision. At present, William's treatment is determined solely as a matter of medical technology; his life is prolonged because it is possible, not because anyone purporting to speak for him has decided that this is the best or wisest course. . . . These cases recognize that medical care decisions must be guided by the individual patient's interests and values. Allowing persons to determine their own medical treatment is an important way in which society respects persons as individuals. Moreover, the respect due to persons as individuals does not diminish simply because they have become incapable of participating in treatment decisions. While William's coma precludes his participation, it is still possible for others to make a decision that reflects his interests more closely than would a purely technological decision to do whatever is possible. Lacking the ability to decide, he has a right to a decision that takes his interests into account. *In re Drabick*, 200 Cal. App.3d 185, 245 Cal. Rptr. 840, 854-55 (Cal. Ct. App.), *cert. denied*, 109 S.Ct. 399 (1988).

Similarly, under well established principles of medical ethics, physicians do not render any and all extraordinary measures to prolong life without considering and maintaining the dignity of the patient.

Contrary to the Missouri Supreme Court's reasoning in *Cruzan*, most courts have applied established legal principles, as well as principles of medical ethics, to conclude that patients or other appropriate third parties in consultation with physicians should be allowed to decide whether or not to utilize life-prolonging treatment

which simply maintains biological functions without providing any meaningful benefit to the patient in a permanent vegetative state. To permit the State to mandate continued artificial treatment will have an adverse impact on initial decisions to use extraordinary measures to hopefully cure or improve a patient's condition. Furthermore, *Cruzan* seriously undermines an individual's right to determine his or her appropriate medical treatment and undermines the maintenance of human dignity of those in a persistent vegetative state.

CONCLUSION

For the foregoing reasons, the Missouri Baptist Medical Center respectfully urges the Court to grant the Petition.

Respectfully submitted,

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